No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. MCCANSE, GUARDIAN AD LITEM,

Respondent,

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF FRANCES AMBROSE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of the parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

On Labor Day, 1952, Frances' mother Mary suffered a stroke and went into a coma. Five months later, Richard Ambrose, Mary's oldest grandchild, returned on leave from the Army. Upon hearing his voice, Mary awakened from the coma. Alth ugh partially paralyzed, Mary had normal mental faculties and a relatively satisfactory life for seven years until another stroke killed her. Frances nursed Mary in their home during those seven years. During those seven years, Mary

never expressed the wish that someone had killed her while she was comatose. This personal experience highlights the following facts important to the present case which are ignored by advocates of starving the comatose and PVS patients.

[1] There is no mechanism for gathering data about the number of those who recover after a long period of being comatose or PVS.

[2] All that exists is a tabulation of anecdotes which understates the odds of recovery, perhaps by more than 100 times.

[3] The number of those who do recover could be substantially increased by appropriate stimulation.

[4] Reasonable people do not wish to be disabled, and this colors their opinions about how they would react to disability. Once disabled, however, if cared for, the disabled cope nearly as well as the

healthy and although they perhaps have less of life, the little they have is just as precious to substantially all of them as the greater measure of life [by abilities] is to the healthy.

[5] They may be in coma or PVS, but it is well known that the last sense which goes as life slips away is usually hearing. There is no evidence that substantial numbers of the PVS cannot hear and compelling evidence that some of them can hear. Undetectable with present technology brain functions which may be of quite a high order occur in some as is proven by the recovery of Mary and the higher recovery rate of those stimulated. Frances became a nurse after Mary died and served 18 years at Henry Ford Hospital in Detroit before retiring.

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SUMMARY OF ARGUMENT

As recent abortion history shows, it is very difficult, perhaps impossible for even the combination of the medical establishment, such as the AMA, et al., most media, the liberal establishment, the leadership and much of the rest of the Democratic party, liberal and many moderate Republicans, and this Court to convince America to accept a Constitutional right to kill a class of human life, when Fundamentalist and Evangelical Protestants and the Catholic Church believe that such killing is forbidden by God. If this Court reverses, and Christians comprising perhaps a majority of Americans disagree, we will have another battle similar to abortion, only far more complicated and intense since euthanasia is far more complex than abortion, and euthanasia threatens a

class far larger than the fetus which none of those active in the abortion battle will ever again be. America does not need such a battle. The analysis of Catholic thought herein indicates to a substantial certainty that the Catholic Church will bitterly oppose the results of any reversal. The logic is such that substantially all Fundamentalists and Evangelicals will agree with the Catholics and be even more active than Catholics in seeking reversal of this Court's [potential future] finding of what they see as an unenumerated US Constitutional "right" to starve the PVS and whoever the "right" gets extended to. There is a substantial probability any such right will be extended, as indicated by Chief Justice Burger's dictum in the original abortion case and the extensions in nations trying a "little" euthanasia.

The debate over the provision of assisted feeding is a debate over whether it is morally ligitimate to withdraw feeding so that the primary and fundamental reason why the person dies is that withdrawal. It is a debate over whether those with a certain "quality of life" can be permitted to be killed by omission. It is a debate over whether feeding provided by routine nursing measures that can significantly sustain the life is a medical treatment that should be governed by the criteria governing other treatments, or whether it is an aspect of normal care, like protection from exposure or hygienic care, that is to be accorded to all patients.

This brief reviews the thoughts of some of the classical Catholic moralists and shows their reluctance to authorize withdrawal of life-sustaining

nutrition and fluids. Where they did permit food and water to be removed, their arguments were either flawed or open to severe criticism. And I will also show that assisted feeding can be required of patients because of the demands of the common good. Requiring assisted feeding when its rejection or removal would be the fundamental cause of death is not foreign to the classical Catholic medical-ethical tradition.

Of course, this Court is not bound to follow the conclusions presented, but it is believed the argument will be useful in that it will indicate what will logically follow if the case is reversed. It is believed certain unfortunate effects must logically follow a reversal.

PRE MODERN TEACHING

Aquinas did not write any treatise devoted specifically to providing food and fluids, but he did note in his Super Epistolas S. Pauli that:

> A man has the obligation to sustain his body; otherwise he would be a killer of himself...by precept, therefore, he is bound to nourish his body and likewise we are bound to all the other items without which the body cannot live.[1]

In this passage Aquinas affirms an obligation to take food and fluids because of a general obligation to sustain life, and he asserts that failing to take them could be morally equivalent to self-killing in some cases. He apparently would not say this about medical treatments, for he would hold it licit to reject medical treatments in some

[1]St. Thomas Aquinas, Super Epistolos S.Pauli (Taurin-Romae: Marietti, 1953), II Thess., Lec. II, n. 77. Translation in Cronin, Daniel, The Moral Law in Regard to the Ordinary and Extraordinary Means of Conserving Life (Dissertatio ad Lauream in Facultate Theologica Pontificiae Universitatis Gregorianae, Romae, 1958),p.48.

cases without being a self-killer.

The passage implies that there are more circumstances in which one could licitly reject medical treatments than there are where one could reject food and water. Aquinas vaguely asserts a distinction between nutrition and fluids and medical treatments, and he imposes a stronger obligation to receive food and water than to receive medical treatments. The reason for this stronger obligation seems to be that food and water are seen as a means of sustaining life whether the person is sick or not, while medical treatments are therapeutic measures only to be used for those with clinical conditions.

Elsewhere, he says in a statement in the Secunda Secundae that should be balanced against the previous one that:

> [I]t is inbred for a man to love his own life and those things which contribute to it, but in due measure (tamen debito proprio) which means those things which permit attainment of the final goal. Thus, those things which permit attainment of the final end of man are to be loved, but only in due measure.[2]

In the previous statement, Aquinas warned against self-killing and a lack of respect for life, but in this one he warns against anxious concern for life and undue love for life-preserving measures. This statement imposes an obligation to have due respect for life and to have a moderate love for those things which sustain life. There is a duty to protect one's life by moderate means and he denounces an exaggerated fear of death which can cause an undue clinging to life. Aquinas has not defined what means of sustaining life are undue, and one must wait for later writers to deal with this issue.

What precisely "due love of the

[2] Summa Theologica, Blackfriars Translation, Anthony Ross, O.P., and P.G. Walsh. (New York: McGraw-Hill, 1966), II,II, q. 126, a. 1.

things that sustain life" would be is not clear from this passage. It would seem that Aquinas is objecting to demands for radically expensive treatments that would not hold out much prospect of prolonging life. If this is true, then it would be hard to see how he could object to tube feeding for a medically stable patient given by routine nursing procedures. This would not seem to be an uncommon or exotic means of preserving life.

What he might mean by medical treatments that can permit the attainment of the final end of many is not clear. He may have been referring to those treatments which enable a person to act rationally and interpersonally. However, that interpretation is unlikely because it would imply that there was no duty to give even palliative care to those who suffered emotional or men-

tal disabilities. What Aquinas probably meant was that treatments which could sustain either biological life itself or human life in all its dimensions had to be given because both of these permit attainment of the final end of man. If he did not mean that, it would be hard to see how he could have objected that refusal of feeding in some cases was self-killing.

In relation to our contemporary controversy on assisted feeding, his principle would affirm a duty to receive and provide readily available forms of assisted feeding when their denial or refusal would be the fundamental cause of death of a medically stable patient. It should be recalled that what is "common" is relative to a society, and in our society assisted feeding administered by routine nursing measures is simply a common mode of providing

nutrition, and it should be provided when its withdrawal would cause death.

2. Francisco Vitoria

Francisco Vitoria requires patients to take ordinary measures to preserve life, and explicitly holds that a patient would have at least to use foods commonly employed by persons to conserve their life.[3] Vitoria affirms an obligation to receive food and water when they can be readily provided by a given society. Only the use of ordinary foods, and not exotic dishes, would be morally required, even if this would shorten the life of the patient. In his own way, he affirms an obligation to give

[3] F. Vitoria, Relectiones Theologicae, (Lugduni, 1587), Relectio IX, de Temp n. 1, (Trans. in Cronin, op. cit., pp. 48-49). Atkinson notes that the obligation to take drugs is less grave than the obligation to take food because food is per se ordered to the preservation of life. See his "Theological History on the Catholic Teaching on Prolonging Life" in Moral Responsibility in Prolonging Life Decisions, edited by Donald McCarthy and Albert Moraczewski, O.P. (St. Louis: Pope John Center, 1981). p. 98.

and receive only what are customarily and commonly available forms of care and feeding in a society.

He claims that it is one thing to destroy life and another to cease to protect or prolong it. One must never do the former, but he holds that it is not always necessary to do the latter. This formulation, however, is too vague and general to be useful, for failing to protect life in some instances is morally equivalent to destroying it. For example, permitting another to die by withholding protection from exposure is morally equivalent to destroying that person's life. Similarly, failing to sustain another's life by withholding life-sustaining food and water that can be provided by routine and customary means is morally equivalent to failing to protect.

Nowhere does Vitoria affirm that

"common" feeding could be rejected, because this would be killing by omission. Like Aquinas, he imposes a stronger duty to provide food than to provide medical treatments, for he holds that the obligation to take drugs is less serious than is the obligation to take food. In order for medical treatments to be morally required in some circumstances, it would only be necessary for there to be some hope of returning to normal functioning or some form of recovery. But "common" food and water, or that by which regularly a man can live (satis est, quod det operam, per quam homo regulariter potest vivere), have to be given even if recovery is not possible, but if there is some hope of life. And if there is a "kind of impossibility" in receiving food and water, Vitoria would not require their provision or acceptance. Thus, if there

was profound revulsion to food, or a medical reason for rejecting it, he would not moraly require it. It is not clear what he means by this, for food and water, hygiene and medicine all naturally aim at preserving life. On this point, Vitoria is ambivalent, for while he admits that food, water and medical treatments are naturally ordered toward life, he affirms a more stringent obligation to provide food and water than to provide medical treatments, implying that they are different in nature.[4]

This ambivalence in Vitoria's thought is important, for Fr. Edward Bayer, a contemporary moral theologian, contends that there is an obligation to provide food and water orally or "connaturally", but that this obligation ceases when

[4]See Atkinson, "Theological History of Catholic Teaching on Prolonging Life", p.99.

a person needs assisted feeding.[5] For Bayer, the natural aspect of oral feeding imposes the obligation, but it is by no means clear that such a distinction was made by Vitoria. It is not clear that Vitoria sees the mode of provision as being as crucial as the commonness of the mode of feeding. What is clear about Vitoria's thought, however, is that he believes that the provision of commonly available, life-sustaining food and water is ethically obligatory.

Relative to the contemporary debate on feeding medically stable comatose patients, Vitoria's teachings would imply that food and fluids, provided as an aspect of basic patient maintenance, could not be withheld from comatose patients because they are now an aspect of "common" feeding. He considered food and water to be different in nature

[5]Ibid.

from medical treatments, and he established different criteria for their provision and acceptance.

3. Juan Cardinal de Lugo

In the century after Vitoria, there was a widespread support among moral theologians for his teachings. Juan Cardinal de Lugo is important because he supported Vitoria's teachings, but he was also important because he drew clearer distinctions between morally permissible letting-die and immoral killing based on the type of means being refused or withheld. He is noteworthy for being exceptionally liberal among his contemporaries for his view of what constituted an extraordinary means.[6] Because of this, Atkinson notes that he was so liberal in his views that he acepted virtually any reason whatsoever for removing a medical treatment.

[6]Ibid.

With regard to the administration of extraordinary treatments, De Lugo claims that a person caught in a burning building would not have to use water to extinguish part of the fire, thus only delaying momentarily the time of death, because partially extinguishing the fire would be a futile attempt to preserve life.[7] This example is strictly applicable to a patient who is truly dying and for whom assisted feeding would not substantially sustain life. In such a case, the removal of food and fluids would not be the underlying and fundamental cause of death as would be the fire, and it would therefore be permissible to remove them.

But whether these sorts of patients would have to be fed is not the issue today. The pertinent issue is whether

[7]De Lugo, Juan. Disputationes Scholasticae et Morales, (ed. nova, Parisiis, Vives, 1868-69), Vol. VI, De Justitio et Jure, Disp. X, Sec. 1, n. 21 (transl. as in Cronin, p. 59).

the removal of feeding should be morally permitted when its removal would be the fundamental cause of death. He holds that the only condition necessary for providing food and water is that there be "some hope of sustaining life".[8] The term "some" does not mean that it be absolutely certain that life will be sustained, but only that there be some prospect of it being continued by the provision of food and water.

According to De Lugo, the failure to employ reasonably available means of preserving life could be equivalent to taking one's life, but he does not identify the conditions under which this might occur.[9] This would imply that assisted feeding would be required if it was readily available and if its

[8]Atkinson, "Theological History of Catholic Teachings on Prolonging Life", p. 102.

[9]Atkinson, "Theological History of Catholic Teachings on Prolonging Life", p. 102.

provision could prevent death by starvation or dehydration.

CERTAIN MODERN THOUGHT

4. Fr. Gerald Kelly, S.J.

A. The Usefulness of Assisted Feeding

Fr. Gerald Kelly developed the doctrine of ordinary and extraordinary means. Kelly claims that families and medical professionals should be brought into treatment decisions because they have moral duties demanding respect.[10]

In his advanced views Kelly provides us with the what has come to be accepted as the "clasical" definition of ordinary and extraordinary means:

> **Ordinary** means are all medicines, treatments and operations which cannot be obtained and used without excessive, pain or other inconvenience.
>
> **Extraordinary** means are all medicines, treatments and operations which cannot be obtainec and used without excessive expense, pain or othe incon-

[10] Ibid., p. 107. Kelly mentions this, it seems, to affirm that families and health care providers have duties to provide care and that authorization of withdrawal of care by either of these can constitute culpable killing.

> venience, or which if used, would not offer a reasonable hope of benefit.[11]

After making this distinction, he proceeds to ask if there could be a "useless ordinary" means of preserving life and if such a means could be morally required. Initially, Kelly argues that all ordinary means are obligatory, but this changes in his later works in which he replies that no one can be required to employ a means that is useless. He therefore declared some ordinary means to be elective because they were "useless".[12]

Kelly argues correctly that a treatment is useless if it does not offer a reasonable hope of checking or curing a disease. In light of this definition, it would seem that provision of food

[11] G. Kelly, "The Duty to Preserve Life", Theological Studies, XII (1951), p. 550.

[12] G. Kelly, "The Duty of Using Artificial Means of Preserving Life", Theological Studies, XI (1950), pp. 218-9.

and fluids by assisted means would be useful when it could prevent the person from succumbing to starvation or dehydration. For in that circumstance, it could "check" the "disease" of starvation.

Oddly, Kelly argues that there would be no obligation to provide fluids and feeding to a patient by assisted means if the patient was unconscious and was expected to die within a few weeks.[14] In this situation food and water should be provided because they could achieve their end of preventing death from dehydration or starvation and thus would not be useless because they could "check the disease". It is thus peculiar that Kelly considers assisted feeding useless simply because its power is temporally limited.

Further application of his principle would imply that feeding which could

[14]Ibid., p.220.

only sustain life for short period of time is "useless" would also seem to allow spoon-feeding to be withdrawn or withheld from a conscious terminally ill patient with even more time to live, because spoon-feeding is more burdensome to others than is tube feeding. It could permit withholding insulin from a diabetic who was expected to live for a couple of weeks, even though its withdrawal would cause death, and it might even permit withdrawal of hygienic care or protection from exposure. Kelly's understanding of utility is correct, but it seems that he did not apply it properly in practice, for he did not see that feeding could fend off death for a limited period of time and was therefore useful. He is correct in saying that useless treatments need not be given, but he fails to see that some forms of assisted feeding were not use-

less when they could prevent death from dehydration or starvation even for a limited period of time by their mere provision.

Kelly's belief that there should be no obligation to continue feeding a patient expected to die within two weeks if the patient is unconscious is quite remarkable. He asserts that a conscious patient should be permitted to decide whether or not to receive feeding, but he holds there is no duty to give food and water to one in a similar state but unconscious.[15] This view would radically limit the obligations of health care providers to the unconscious terminal patient, and it implies the moral permissibility of abandoning provision of all treatment for them. It is also quite discriminatory because it implies that capacity for psychological relating is the ground for the possession of moral rights. Kelly would undoubtedly object to recently enacted Baby Doe Regulations of the Child Abuse Act which prohibited the removal of food and water from comatose infants, despite the fact that strong approval was given these regulations by the disabled community.[16]

Kelly's argument in favor of removing feeding from unconscious terminally ill patients is pertinent to the contemporary issue of providing feeding for the medically stable comatose. For, under some definitions of euthanasia, withdrawing food and water from them would be mercy killing because the withdrawal would be done for the purpose

[15]Ibid., p. 219.

[16]Non discrimination on the Basis of Handicap; Procedures and Guidelines Relating to Health Care for Handicapped Infants; Final Rule, 49 Fed. Reg. 1622, 1623 (January 1983). HHS reported that after a period of comment, 16,739 comments were received, 96.5% of which were favorable.

of causing death to prevent a patient from experiencing severe pain. Kelly correctly argued that the removal of some medical treatments in such cases was permissible, but feeding should not be withdrawn, since withdrawal of food and water would cause death as surely as would a lethal injection.

The withdrawal of food and water, provided as an aspect of routine patient maintenance and of normal nursing care, is not merely the "occasion" of the patient's death, but is its cause. Kelly ignores the issue of causation of death, and he seems to feel that there would be nothing wrong with causing death if death was expected in only a matter of days.

Kelly's endorsement of withdrawing feeding from a comatose patient who was expected to die shortly did not go uncontested, however, for Fr. Joseph

Donovan argued that IV feeding was ordinary medical treatment and that there was no impossibility in feeding the comatose.[17] He claimed that removing feeding in the instance where Kelly permitted it was morally equivalent to causing death, and he essentially charged Kelly with permitting mercy killing by omission when death was imminent.

Kelly was apparently unaware of a difference between ordinary medical treatments and what some ethicists are now calling normal care or minimal care. This category consists of hygienic care, protection from exposure, psychological support, feeding, and the maintenance of such devices as urinary catheters. Some now believe that to withhold these forms of care would be morally equivalent to killing by omission, but Kelly men-

[17] Homiletic and Pastoral Review, XLIX, (August, 1949), p.72.

tions none of this and it is not evident that he had a clear idea of what constituted killing by omission.

B. Assisted Feeding and the Common Good

Kelly states explicitly that patients could be required to use extraordinary and per se elective measures if this was required by the common good or a higher value.[18] This should be applied to protecting society from the emergence of socially and legally endorsed mercy killing. The common good can require a person to accept assisted feeding in order to prevent the social and legal endorsement of euthanasia by omission which would pose a clear threat to the handicapped, immature, unstable and medically vulnerable from mercy killing.[19]

[18]Kelly, The Duty of Using Artificial Means of Preserving Life, p. 206; p. 106.

[19]St. Thomas says that "[T]he community has necessarily the same goal as the individual." "The good of the individual is not a final end but is subordinated to the common good." "Individual well-being cannot exist without the welfare of the community...therefore it is judging correctly in the light of the common good that man must recoginze what is good for him." See Welty, op. cit, p.94. This principle is in harmony with what some moralists call "universal justice" for such demands to be made. Universal justice is the most important of the natural virtues, according to Thomas. Summa Theologica, II-II 58, 6-7.

Acting in behalf of the common good is required by justice, and is commanded by the virtue of universal justice which seeks to protect the well being of all by directing all actions toward the common good.[20]

Assisted feeding could be mandated for certain classes because allowing them to reject it or be denied it would place entire classes of handicapped, despairing, terminal and chronically sick patients at risk. Because there is so much imprecision in medical diagnosis and prognosis, feeding should be required for all where it is medically

[20]Welty, Handbook of Christian Social Ethics, p. 112, 113, 312-3.

possible so that those who should be justly given feeding are not denied it.

5. Daniel Cronin

Daniel Cronin teaches that ordinary means hold out a hope of beneficial results, are commonly used, are proportionate to one's social position, and are not difficult to employ. Even though he does not say when it would actually become so, he agrees that feeding could become extraordinary if it was useless. It could also be rejected if it was impossible to provide, required great effort to receive, caused great pain, was radically expensive, or caused intense revulsion. For Cronin, the patient possesses the dominant right to decide what treatments are ordinary or extraordinary, and if the patient is incompetent the physician should provide only ordinary treatments.[21] Cronin demands that

the physician not only avoid practicing euthanasia, but also avoid even giving the impression of practicing it.

Commenting on Vitoria's views on feeding patients, Cronin says the following:

> Food is primarily intended by nature for the basic sustenance of animal life. Food for man is basically and fundamentally necessary from the very beginning of his temporal existence. It is basically required by this human life and nature intends food for this purpose. That is why man has the right to grow food and kill aniamls. Furthermore, because it is a law of nature that man sustain himself by food, it is a duty for man to nourish himself by food. In the case of drugs and medicines, the same is not true. Drugs and medicines are intended per se by nature to help man conserve his life. However, this is not by way of exception. Drugs and medicines are not the basic way by which man is to nourish his life. They are intended by nature to aid man in the conservation of his life when he is sick or in pain or unable to sustain himself by natural means. These artificial means are not natural means but they are intended by nature to help man protect, sustain and conserve his life. If man were never to be sick, he would never need medicines. If he is sick, however, it is quite natural for him to make use of artificial means of conserving life.[22]

It is hard to see how these condi-

[21] Atkinson, "Theological History of Catholic Teaching on Prolonging Life", pp. 110-113.
[22] Ibid., pp. 113-114.

tions, would make assisted feeding optional for the comatose patient because these patients apparently do not experience pain, and tube feeding is apparently less burdensome for others than is spoon feeding. Thus, it would seem permissible to conclude that Cronin would not permit assisted feeding and fluids to be withdrawn from a patient if so doing would be the fundamental cause of death.

6. Joseph Sullivan

Joseph Sullivan acknowledges that there is a difference between feeding and medical treatments. He argues that ordinary means of preserving life are required of all patients, but he does affirm that there are two kinds of ordinary treatments. On the one hand, there are artificial ordinary treatments, such as surgeries, X-rays, transfusions and IV feedings.[23] On the other hand,

he suggests that there are natural ordinary means of preserving life such as feeding, protection from exposure,excercise and regular diet. He argues that a natural means of prolonging life is per se ordinary and yet it could become per accidens extraordinary.[24]

Sullivan argues that a cancer patient in extreme pain with a toleration for painkillers could have food and water removed even if the patient could live a good while.

These views can be challenged because it is clear that the intention

[23]Joseph V. Sullivan, Catholic Teaching on the Morality of Euthanasia (Washington: Catholic University of America Press, 1949), p. 65.

[24]Sullivan holds that the following are natural ordinary means of preserving life:

> Among the natural means of preserving life would be included such means as proper clothing, housing, physical recreation, good food, regularity at meals, etc. A natural means of prolonging life is, per se, an ordinary means of prolonging life, yet per accidens may be extraordinary.... An artificial means of prolonging life may be an ordinary means or an extraordinary means relative to the physical condition of the patient. Ibid., p. 65.

of withholding the food and water is to effect death to end suffering. We should recall that euthanasia is "an act or method of causing death painlessly so as to end suffering", and the explicit purpose of removing feeding is not to remove a treatment which itself causes great pain to the patient, but to cause death so that suffering from the disease will cease.[25] If the means of delivering the feeding were the cause of the patient's pain, it might be justified to withdraw it. It is not clear how what he endorses is distinguished from mercy killing by ommission.

It is interesting that Sullivan mentions nothing of Kelly's claim that even extraordinary means can be forced

[25]How one can withdraw readily providable assisted feeding from a medically stable patient without intending death is not clear. Death is as certain as if it were caused by a lethal injection, and death is not a side effect of an act eliminating suffering, but the means by which the suffering was eliminated.

on a patient for the common good. And he does not discuss Vitoria's or De Lugo's claim that feeding should be given when there is "some hope of life". They saw not only a difference between feeding and other forms of medical treatment, but they also affirmed that different sorts of criteria governed their provision. Sullivan saw none of this, and simply affirmed that the same criteria governed the provision of food and water in all circumstances. He did not discuss the issue of causality with respect to feeding, and he did not say why the failure to provide or receive naturally or artificially ordinary means was immoral. Had he done this, he might have been more willing to establish a stricter criterion for the provision of natural and assisted feeding.

7. Charles Mc Fadden

Charles Mc Fadden believes that

the temporary use of medical treatments, including food and water, is ordinary while their long-term use would be extraordinary.[26] This view is questionable because it would seem to imply that the longterm ~~use~~ of insulin by a diabetic or spoon feeding of the senile would also be an extraordinary treatment as well. The difficulty is that it is no more burdensome to give assisted feeding that to give spoon feeding, and declaring assisted feeding useless would strongly imply that the long-term use of more burdensome forms of care or treatment such as wheelchairs, or even visual aids for the visually impaired, would be extraordinary. McFadden was apparently seeking to be compassionate to the terminal by articulating this principle, but in so doing he created a principle that could place many medically vulnerable persons in jeopardy.

[26] McFadden writes:

> Routine medical pratice today utilizes intravenous feeding in a countless variety of cases. Certainly the physician regards this procedure as an ordinary means of conserving life. It is obviously able to be carried out, under normal hospital conditions, without any notable inconvenience. For this reason, we must regard recourse to intravenous feeding, in the case of typical hospitalized patients, as an ordinary and morally compulsory prodedure.
> The above conclusion applies, as stated, to routine hospital cases where the procedure in envisioned as a temporary means of carrying a patient through a critical period. Surely any effort to sustain life permanently in this fashion would constitute a grave hardship and not be normally compulsory.

Charles J. McFadden, The Dignity of Life (Huntington, Ind.: Our Sunday Visitor Press, 1976), p. 152. One must question this judgment. Intravenous feeding is less burdensome than giving some Alzheimer's patients spoon feeding. Does that mean that feeding those patients permanently would also be elective and not obligatory? Would the permanent use of colostomies also be elective if they were required for long term use? Many individuals now live with the aid of portable respirators. Are those too elective, despite the fact that people can lead largely normal lives with them?

Recent Catholic Church Statements

In light of these findings, it does not seem possible to hold that the Catholic medical ethical tradition would be subverted by asserting that feeding be provided when it is an aspect

of basic patient maintenance. It cannot simply be said that without qualification the "tradition" permitted assisted feeding and fluids to be removed. It does not appear true that the Catholic tradition simply allowed feeding to be withdrawn from patients, for the majority of these writers prohibited the withdrawal of feeding when it was an aspect of basic patient maintenance.

This does not appear to be true for three reasons. First, many in the tradition asserted principles that would not allow removal of life-sustaining food and water from patients, and many in the tradition who argued for its removal failed to provide adequate reasons for that judgment. Second, a number of recent official teachings on this issue have affirmed obligations to feed. And third, there is an emerging consensus within the Church that this sort of

feeding is morally necessary. The Catholic social justive tradition affirms duties of justice to give food and drink to those in need.

Thus, Aquinas would not permit self-killing, and he required that commonly available feeding be provided and accepted by all persons. Vitoria demanded that feeding be given as long as there was "some hope of iife". De Lugo, despite his laxity on many issues, affirmed that feeding be given and received as long as there was "some hope of life", and he held that the refusal of reasonable available means to sustain life would be morally equivalent to suicide.

Gerald Kelly demanded that extraordinary treatments be given when required by the common good, and this would certainly include assisted feeding in some cases. When he did allow life-sustaining,

readily available assisted feeding to be withdrawn, he defended that judgment poorly by arguing that feeding was speculatively ordinary but practically extraordinary. Daniel Cronin admitted a difference between nutrition and fluids and medical treatments, but he did not draw out the implications of this difference. As a result of this he did not see that there should be different criteria governing the provision of food and water from those governing the administration of medical treatments.

Joseph Sullivan admitted that there was a difference between feeding and other forms of ordinary care, but he permitted feeding to be removed from a cancer patient who was in great pain but who would live a long while because of a strong heart. But, because the intention of the action was to end the life of a person in extreme suffering,

his view is questionable inasmuch as it seems to be endorsing euthanasia by omission. He elided natural feeding into the category of ordinary medical treatment by requiring its provision according to the same standards as those governing ordinary medical care. Previous authors asserted stricter obligations to provide ordinary feeding, but Sullivan would not accept this. He recognized that there was a difference between natural and assisted feeding, but he did not see that different type of obligation should flow from that difference. And Charles McFadden allowed permanent assisted feeding to be removed because it was a burden, but he did not say how this was a burden to the comatose patent, the first individual to be considered in making these estimates.

Second, in the past decade, a number of important official statements have

been issued on the provision of food and water to patients, and these have supported the view that quality of life judgments are not to be allowed to determine if feeding is to be given. The Declaration on Euthanasia held that it was ligitimate to refrain from using remedies when existence was precarious and painful, but it held that ordinary means had to be provided.[27] In The Matter of Nancy Ellen Jobes, the New Jersey Catholic Conference filed an amicus curiae brief arguing that this severely brain-damaged but medically stable young woman be fed.[28] The bishops argued that removing feeding would be morally equivalent to intentional killing and said

[27] Declaration on Euthanasia of the Sacred Congregation for the Doctrine of the Faith, May 5, 1980.

[28] Brief, Amicus Curiae, and appendix, In the matter of Nancy Ellen Jobes, on Behalf of the New Jersey Catholic Conference, #26, 041, p. 5.

the following:

> ...nutrition and hydration, being basic to human life, are aspects or normal care, which are not excessively burdensome, that should always be provided to a patient. Nutrition and hydration are directed at sustaining life. Medical treatment is therapeutic; nutrition and hydration are not, because they will not cure any disease. For that fundamental reason we insist that nutrition and hydration must always be maintained. As the Pontifical Academy for Sciences noted in this respect in its report on "The Artificial Prolongation of Life and Its Exact Determination of the Moment of Death": If the Patient is in a permanent coma, irreversible as far as it is possible to predict, treatment is not required, but care, including feeding must be provided.[29]

Immediately after the Judicial Council of the American Medical Association issued its opinion that considered removal of food and water from comatose patients who were not imminently dying, Archbishop Philip Hannan condemmed the Judicial Council's opinion.[30] And after

[29] Ibid.

[30] In a letter on March 16, 1986, Archbishop Hannan wrote the following: The Catholic Church has always held that families are not obligated to use extraordinary means-such as artificial life support systems-to sustain the life of a patient in a hopelessly irreversible coma. However, food and water are ordinary means of sustaining life. Therefore, the Catholic Church opposes the American Medical Association position because it approves denying a person the normal

an appellate court in California ordered caregivers and a hospital to remove a feeding tube which they gave Elizabeth Bouvia because they thought she was trying to starve herself to death, Archbishop Roger Mahony called the decision irrational.[31] Most recently, in the lead editorial in the Jesuit theological journal La Civita Cattolica, which is often a mouthpiece for the Vatican's thinking on issues, withholding "ordinary means" such as food, blood transfusions and injections" was rejected as immoral.[32]

nourishment that he or she needs to sustain life.

[31] "Mahony Critical of Logic in Bouvia Case", San Fernando Valley Daily News, April 24, 1986, p.1. In addition, Cardinals Law and Bernardin also criticized decisions to allow food and water to be removed from patients. See "Law Takes Side in Coma Case", The Boston Herald, June 8, 1985, and "Cardinal Warns of Euthanasia", Chicago Catholic, April 16, 1986.

[32] La Civita Cattolica, February 21, 1987. The editorial cited the report of the Vatican Commission "Cor Unom" which stated:

> There remains the strict obligation to apply under all circumstances those therapeutic measures which are called 'minimal': that is, those which are normally and customarily used for the maintenance of life (food, blood transfusions, injections, etc.).

These statements clearly show that a consensus is emerging in the official teachings of the Church on the moral obligation to provide assisted feeding when it is an aspect of basic patient maintenance. It is clear that through these official statements the magisterium is correcting deficiencies in the moral theological tradition of recent years and is teaching that withholding life-sustaining feeding is killing by omission.

Third, giving food and drink to those in need is in clear harmony with classical Catholic social justice principles. This obligation has been repeatedly affirmed in recent Papal Encyclicals which have called on the rich nations to care for those nations which cannot feed themselves, and it is imposed on

The editorial also criticized efforts to withhold "ordinary means" of treatment such as food, blood transfusions or injections. See "Euthanasia Spreading, Jesuit Journal Warns" The Boston Pilot, March 6, 1987.

the rich nations as a matter of justice. The Encyclical Populorum Progressio expressed concern for the growing problem of hunger in the world and it saw despondency as a consequence of this hunger.

This issue of providing feeding to patients is part and parcel of this problem. Lack of food was viewed as posing hazards greater than were immediately apparent, and it considered lack of food and water an ancient scourge. The Holy Father simply asserted "No more hunger, hunger never again!"[33] He did not say this about the hunger of the poor, but about hunger in general. The Holy Father said that the lack of prudent economic planning was one reason why some suffered hunger. This point should be taken seriously with respect

[33]"Address of His Holiness Pope Paul VI to the Participants of the World Food Conference," Rome (Nov. 9, 1974), para. 2. In Gremillion, op cit., pp. 599-606.

to assisted feeding, for many have sought to justify its removal precisely for economic reasons. The Holy Father asserted that the right to satisfy one's hunger must finally be recognized for everyone, according to the specific requirements of his age and activity, and he called for vigilance and courage to feed the hungry.[34]

The obligation to feed the hungry seems to be based on the Gospel story of the Good Samaritan. The failure to give food and drink to the nameless victim is denounced as not just a failure of charity, but a loathsome failure of justice. The Samaritan does not stop to investigate the medical condition of the victim of brigands, but simply gives food and drink. Those who fail to do this are not depicted as merely being lacking in charity, but as being

[34]Ibid., para. 2,3, pp. 602-606.

hateful and maliciously selfish and egocentric. The Good Samaritan is really a "minimally decent" Samaritan who simply does what common decency demand. He does not ask if the man will survive a long period of time, fully recover his capability for human action, or be able to act for human spiritual and affective ends. He does not ask if his actions will increase his sufferings, and he certainly does not "put the man ou of his misery" by giving him a "quick and painless death"!

This general obligation to give food and drink does not cease when nursing techniques are needed to provide them, for it is probably easier to give IV or NG feeding to a hospital patient in the United States than it is a starving person in the African or South American countryside, for instance. Thus, a social policy of permitting food and

water to be withheld from those who can live if these are provided could undermine this developing moral consensus that food must be given to all people by those with the capability.

Food and water, irrespective of their mode of provision, are basic resources of the body and are not therapeutic measures. They are used by every cell, organ and system in the body to sustain its natural functions, and their natural finality or teleological orientation is not therapeutic. Unlike medical treatments, all people require them whether they are well or ill. To remove them when their mere provision is by routine techniques of patient maintenance is to kill the patient by omission through their denial. Removing them does not allow an underlying pathological condition to be set free, but sets the process of dying immediately into motion.

In affirming that life-sustaining assisted feeding provided by routine nursing measures is an aspect of normal care and basic patient maintenance, classical doctrines that were obscure and not fully understood are made clearer. It is now clearer to many in the Church that withholding or removing these constitutes killing by omission. The Church is not getting on to a slippery slope by affirming this, but is making more articulate and clear an insight that has been present, though vague and ambiguous, for generations.

What Logically Follows?

The preceding is reasonably representative of Protestant ethics, at least among Fundamentalist and Evangelical Churces. Accordingly, reversing would once more, as in the abortion situation have this Court opposing Christians.

Abortion has taught us that, in the field of public policy, once the door of legalization has been opened, there is no way to limit the application of "beneficent euthanasia" or mercy killing to a narrow range of cases definitely circumscribed and carefully controlled. To legalize mercy killing in one case is to legalize it in a full range of cases that were never contemplated by the progenitors of the policy. In order for the law to be stable and to serve as an effective guide to human conduct, it must provide a clear form of regulation for human conduct especially where the most basic legal protection of human life is at issue: the homicide laws.

The traditional view of medical ethics and of the homicide law has been to condemn any form of mercy-killing,

whether by act or omission.[1] Consequently, a decision to withdraw or omit nutrition and hydration with the primary and direct intent of killing the patient is illicit. This does not mean, however, that every withdrawal or omission of nutrition and hydration is wrong, or is done with the requisite intent of killing the patient. Nonetheless, doing so with the requisite intent is wrong.

In order to avoid this prohibition, a line of argument has developed that attempts to distinguish the act of withdrawing nutrition and hydration from the act of killing. According to this argument, the patient is not killed by the

[1]Note, Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations, 48 NOTRE DAME L. REV. 1202, 1203 (1973).

cessation of feeding, but rather, by the underlying disease that prevents the patient from swallowing normally. In a case where a feeding tube is functioning properly to provide nourishment, and the patient is not terminally ill, this argument should not be accepted by a court nor should we accept it. The legal doctrine of proximate causation would seem to be in direct contradiction to this argument. Proximate causation creates responsibility for injury for any action or omission when, but for the happening of that action or omission, the injury would not have resulted. In addition, the act must not be excessively remote from the injury sustained. These conditions are met when nutrition and hydration are omitted or withdrawn from a patient who is not terminally ill nor imminently dying or for whom nutri-

tion and hydration are not useless or are not excessively burdensome.

The ethical analysis of the nutrition and hydration issue can start with the principal of but for causation. When these elements are removed with the knowledge that death will result, and there is no medical indication for removing them, the standard of but for causation has been met.

A second principle that is useful is that of duty. A physician has a fundamental legal and moral duty to provide his patient with reasonable and ordinary care according to the contemporary standards of the medical profession. This duty does not extend to treatment which involves excessive burden to the patient, or to useless treatment. In those circumstances, the physican's duty ceases. He is also

obligated to see that the patients under his care receive the basics of rudimentary human care. Traditionally, this has meant that food, water, shelter, and warmth are provided - not as a matter of medical judgment, but to preserve the basic human needs of the patient.

Again, on the question of duty, we are seeing the public debate develop novel arguments that attempt to avoid the consequences of the fundamental duty to provide nourishment. This is done by conditioning the duty to feed on quality of life criteria. Thus, some propose that the duty to feed ought to cease when a patient is in an irreversible coma, or a persistent vegetative state. Moving the criterion from quality of treatment (whether the treatment is beneficial or useless or excessively burdensome) to quality of life represents a

quantum leap in the search for moral norms in this area. When quality of life criteria are used, the issue then becomes the uselessness or burdensomeness of the life itself, not the treatment. What moral norms would be used to determine whether a life was worth living? Who would enunciate such norms and who and how would they be applied?

The difficulty with quality of life criteria is that they are not manageable. We often hear reference to an estimated population of 10,000 patients in a persistent vegetative state in this country, as if this were a discrete and insular class of patients that could be treated distinctly from other patients. The testimony in the recent Jobes case indicated that there can be substantial differences in diagnosis among the very top specialists in neurology on the

precise condition of a severly imparied patient such as MS Cruzan. Even Dr. Fred Plum, who testified in Jobes that the patient is in a vegetative state, was quoted in the President's Commission Report as saying that one of the great problems in this area is imprecision of diagnosis.[2] If cases such as this were to result in a general rule that patients in a permanent vegetative state do not need to be fed, this problem could escalate and affect the treatment and care of many patients who are not in a persistent vegetative state.

In addition, are we really certain that society will preserve a distinction

[2]President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 459-460 (1983).

between a patient such as MS Cruzan and senile residents of state institutions who also require tube feeding? If quality of life criteria are accepted in the one case, it may be very difficult to prevent their application in other cases. If these criteria are utilized to create an exception to our existing prohibition against euthanasia, then the force of that law will collapse under the weight of potential quality of life judgments that can be made on the basis of many particular ailments. The common sense observer sees no public policy difference in starving someone to death (which causes prolonged and additional pain and suffering) and mercifully ending the life without adding the agony of starvation. One compelling ethical reason, therefore, to resist the arguments based on quality of life is to preserve the

integrity of our legal prohibition against euthanasia.

Appellants have equated mechanical means of providing food and water with medical treatment and have equated personal decisions of the patient with informed consent to decisions via substituted judgement by people who, although close to the soon to be decedent, may well have a different outlook. No legislature has agreed with appellants, and most legislatures passing living will laws have specifically eliminated the removal of nutrition and hydration as an option.

CONCLUSION

A broad reversal will be handwriting on the wall of the old folks home. The Court should not reverse unless it is substantially certain of what may follow.

Respectfully submitted, ROBERT L SASSONE
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NO 88-1503

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L AND JOYCE CRUZAN

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. McCANSE, GUARDIAN AD LITEM,

Respondent.

Affidavit of mailing of amicus brief - copies, Rule 28.2

State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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Subscribed and sworn to before me on
October 11, 1989,

Lawrence D Sassone, Notary Public